IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DONALD LANNOM,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

No. 21973

Appeal From the United States District Court
For the Southern District of California

APPELLANT'S OPENING BRIEF

[illegible], O'LAUGHLIN, HUGHES & CASTRO
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I.

STATEMENT OF JURISDICTION

This is an appeal from a judgment of the United States District Court for the Southern District of California, adjudging appellant guilty of both counts of a two-count indictment (set out verbatim in Appendix A), charging a violation of Title 21, U.S.C., §176(a) (Clerk's Transcript, pp. 2, 44; Reporter's Transcript, p. 227). References to the Clerk's Transcript hereinafter will be designated C.T., and references to the Reporter's Transcript hereinafter will be designated R.T.

Judgment was imposed on February 27, 1967, whereby appellant was committed to the custody of the Attorney General for a period of 8 years on counts One and Two, said

sentences to run concurrently (C.T., p. 45). On the same date, a timely Notice of Appeal was filed (C.T., p. 45-A).

The District Court had jurisdiction pursuant to the provisions of Title 18, U.S.C., §3231. This Court has jurisdiction to entertain the instant appeal from the judgment under Sections 1291 and 1294, Title 28, U.S.C., and Rules 37 and 39 of the Federal Rules of Criminal Procedure (Title 18, U.S.C.).

II.

STATEMENT OF THE CASE

An indictment was returned against appellant by the grand jury for the United States District Court, Southern District of California, which indictment was filed November 9, 1966 (C.T., pp.2-3; Appendix A). The indictment was in two counts. Count One charged appellant and his wife with aiding and abetting the importation of approximately 198 pounds of marijuana. Count Two charged them with aiding and abetting the transportation and concealment of approximately 198 pounds of marijuana. Both charges were alleged to have been in violation of Title 21, U.S.C., §176(a), and Title 18, U.S.C., §2. Upon arraignment, appellant and Mrs. Lannom entered pleas of not guilty to both counts. Thereafter, a Motion for Severance and Separate Trial of the two defendants was granted (C.T., p. 29; R.T., p. 11). The following day trial of appellant was commenced before the Honorable Fred Kunzel on January 24, 1967 (R.T., p. 29), which trial resulted in a

finding of guilty as to appellant on both counts (C.T., p. 44; R.T., p. 227).

Counsel for appellant moved the Court to enter a judgment of acquittal as to both counts, which motions were denied (R.T., pp. 182, 228). In argument on these motions, counsel for appellant at trial urged that the evidence adduced by the government depended entirely on the testimony of an accomplice (R.T., pp. 169-182). In addition to urging this ground as a basis for a judgment of acquittal, instructions were proposed by the defense which, in effect, requested that the jury be advised that appellant could not be convicted on the uncorroborated testimony of an accomplice (C.T., pp. 33-40; R.T., pp. 185-188). These requested instructions are set out verbatim in Appendices C-1 through C-8.

The defense also requested an instruction to the effect that a witness available to the prosecution to maintain its burden of proof, which witness the prosecution does not produce, is presumed one who would testify against the government (R.T., pp. 198-199; C.T., p. 32; Appendix B). In support of this requested instruction, evidence was offered that persons who actually accompanied Mougey to Tijuana, and one of these persons (an ex-wife) who was actually in the car at the time Mougey imported the marijuana, were available during the course of the trial but had not been called by the United States Attorney (R.T., pp. 202-205).

III.

SPECIFICATION OF ERRORS

1. Prejudicial error resulted from the trial court's refusal to give a requested instruction that failure of the prosecution to call witnesses available to maintain its burden of proof gave rise to a presumption that these witnesses would testify against the government.

2. Appellant was prejudiced by the trial court's failure to give requested instructions that he could not be convicted on the uncorroborated testimony of an accomplice.

IV.

STATEMENT OF FACTS

William Mougey testified that in April, 1966, he was introduced to appellant, who was identified as Don the Barber (R.T., p. 34). On April 8, Mougey, Ed Herreras, appellant, appellant's wife, and another girl, travelled from Los Angeles to Tijuana (R.T., pp. 39-40). On the trip from Los Angeles, appellant received a speeding citation, which was confirmed by the citing officer (R.T., pp. 41, 123). After arriving in Tijuana, Mougey stated that appellant departed and subsequently re-met the group, at which time he, Mougey, was taken to a side street in Tijuana where a vehicle was pointed out (R.T., p. 41). This vehicle was a 1957 Chevrolet which Mougey subsequently drove to the Los Angeles area, accompanied by a girl companion who had come down with the group from Los Angeles (R.T., pp. 41-42). After returning to the Los Angeles

area, the party spent the night at appellant's home (R.T., p. 42). There is some discrepancy in Mougey's testimony as to who spent the night and the order of departure, but Mougey stated that he eventually received $500.00 for driving the vehicle, which sums were shared with Ed Herreras and the girl who accompanied him although he was uncertain as to the method of payment to him and his payment to Herreras and the girl companion (R.T., pp. 41-42, 58-60). In any event, Mougey stated that he expressed a desire to make additional trips and purportedly initiated further contact with appellant (R.T., pp. 41-42). There was no showing that any marijuana was involved in the first trip (R.T., p. 87).

According to Mougey, the events which immediately preceded his arrest commenced with his visiting a bar in Van Nuys, California, known as Pappy's, where he proceeded to drink a sufficient amount that he attributed convenient lack of recollection at trial to alcoholic intake (R.T., pp. 85-86). Mougey was purportedly to meet Ed Herreras but this individual failed to come to the bar where Mougey was drinking (R.T., pp. 44, 105). Mougey therefore made calls to appellant which the witness states culminated in his being given instructions to return to Tijuana and pick up the same car he had driven from Tijuana on April 8 (R.T., pp. 44, 86). Despite his purported alcoholic stupor, Mougey testified that he was able to enlist the aid of a sister and brother-in-law, John and Erica Burnham, and an ex-wife (Kathy), to whom he owed

support (R.T., pp. 86-89). After some shuffling of vehicles and children, including Mougey's driving despite a convenient alcoholic blackout of details, the group, consisting of Mougey, his wife, his sister and brother-in-law departed for Tijuana, the brother-in-law, John Burnham, driving a vehicle belonging to the ex-Mrs. Mougey's current husband (R.T., pp. 88-92).

After arriving in Tijuana, the group proceeded directly to a motel near the Caliente racetrack where Mougey entered the vehicle he had driven to Los Angeles on a previous occasion, and the group departed (R.T., pp. 44, 101-102). After stopping to clean the windshield, Mougey asked his ex-wife to accompany him in the Chevrolet and she consented (R.T., p. 103). Gas was purchased in Tijuana and Mougey drove to the border, followed by Burnham in the Oldsmobile (R.T., pp. 103-104). Upon arrival at the border, the 1957 Chevrolet was searched by customs officers and approximately 198 pounds of marijuana removed therefrom (R.T., pp. 125-129, 154). The Burnhams, although immediately behind Mougey and his ex-wife, were apparently not stopped (R.T., pp. 52, 54). The government's witness admitted giving the customs officers a fictitious story and in fact took them to the Los Angeles area where the car was purportedly to be picked up (R.T., pp. 95-96).

After being arrested, Mougey was released on bail, the premium for which, according to bondswoman Juana Martinez Goldstein, had been in part supplied by appellant (R.T., p.149). Mougey stated that after being released on bail, he contacted appellant and requested a meeting at a bar known as the Sir Knight (R.T., pp. 47-50). According to Mougey, this meeting culminated in his being beaten up by appellant and other persons, although a Los Angeles police officer, who saw Mougey almost immediately after the purported beating, failed to notice any evidence of physical abuse (R.T., pp. 48-50, 98, 143-145).

Mougey and his wife were indicted for a charge involving the 198 pounds of marijuana, and were subsequently charged in another indictment, along with John and Erica Burnham, with a violation of the Federal law in connection with 198 pounds of marijuana alleged to have occurred on April 22, 1966 (R.T., pp. 51, 203).

The government produced two witnesses, Lynn Drake and Glen Stewart, who testified that appellant was present when the 1957 Chevrolet had been purchased in the Los Angeles area (R.T., pp. 115-119, 162-168). Although the record established that John Burnham, Erica Burnham and the ex-Mrs. Mougey were present during the initial stages of the trial, nevertheless the government did not offer these persons as witnesses (R.T., pp. 54-55, 198-203, 205).

V.

ARGUMENT

A. PREJUDICIAL ERROR RESULTED FROM THE TRIAL COURT'S REFUSAL TO GIVE A REQUESTED INSTRUCTION THAT FAILURE OF THE PROSECUTION TO CALL WITNESSES AVAILABLE TO MAINTAIN ITS BURDEN OF PROOF GAVE RISE TO A PRESUMPTION THAT THESE WITNESSES WOULD TESTIFY AGAINST THE GOVERNMENT.

The instruction which counsel for appellant at trial proposed is set out verbatim in Appendix B hereto, and can be found on page 32 of the Clerk's Transcript. As noted in the very requested instruction itself, the proposed language was an exact quote from the opinion of this Court in Yaw v. United States, 228 F.2d 382 (9th Cir. 1958). This doctrine, of course, is not one which was originated by this Court, nor is it a doctrine which dates only to 1958. In fact as early as 1893, the Supreme Court of the United States recognized the principle:

> "The rule even in criminal cases is that if a party has it peculiarly within his power to produce witnesses whose testimony would elucidate the transaction, the fact that he does not do it creates the presumption that the testimony, if produced, would be unfavorable."

Graves v. United States, 150 U.S. 118, 121 (1893).

See also: Scanlon v. United States, 223 F.2d 382, 391-2 (1st Cir. 1955) in connection with a prosecutor's comment on defendant's failure to produce witnesses.

United States v. Jackson, 257 F.2d 41, 43-44 (3rd Cir. 1958) concerning a court's refusal to allow

counsel for an accused to comment on the government's failure to produce material witnesses.

It should be noted that in the instant case, the witnesses to whom reference is herein made were not simply strangers who observed portions of the transaction culminating in Mougey's arrest at the border. All of those persons who were present at the initial stages of the trial, as the record demonstrates, were actual participants who eventually were charged with the very offense of which appellant stands convicted. In fact, the ex-Mrs. Mougey was a passenger in the very vehicle containing the marijuana. Under these circumstances, therefore, it is submitted that a requested instruction as offered was entirely appropriate.

Compare: Bradford v. United States, 271 F.2d 58, at page 65 (9th Cir. 1959). The very point which the Court in the Bradford decision holds rendered the requested instruction on failure to produce witnesses inappropriate is not applicable to the instant case. As noted in the Bradford opinion, the witness to which reference was made was not present at any occasion when narcotics were transferred, purchased, et cetera. In contrast to that situation, the instant case demonstrates that the ex- Mrs. Mougey and John Burnham were the sina quo non so far as Mougey being able to get to the vehicle containing the marijuana. It is submitted, therefore, that appellant was absolutely entitled to the requested instruction so far as these witnesses are concerned.

B. APPELLANT WAS PREJUDICED BY THE TRIAL COURT'S FAILURE TO GIVE REQUESTED INSTRUCTIONS THAT HE COULD NOT BE CONVICTED ON THE UNCORROBORATED TESTIMONY OF AN ACCOMPLICE.

Appellant is not unmindful of this Court's opinion in Cheadle v. United States, 370 F.2d 314 (9th Cir., Dec.27,1966) decided a short time prior to commencement of the trial from which appeal is herein sought. That opinion, of course, reiterated a rule adhered to in this Circuit for a substantial period of time to the effect that a conviction may be predicated solely on the uncorroborated testimony of an accomplice.

See also: Quiles v. United States, 344 F.2d 490, 494 (9th Cir. 1965), and Doherty v. United States, 230 F.2d 605 (9th Cir. 1965), explicitly holding that the California rule concerning corroboration was not applicable.

Appellant respectfully requests that the Court re-evaluate the rules previously announced in connection with testimony of accomplices. The dangers inherent in the rule as it presently exists are obvious. (See: Ramirez v. United States, 363 F.2d 33, 34 [9th Cir. 1966]). The instant appeal actually puts into bold relief the inappropriateness of allowing the guilt or innocence of another individual to depend entirely on evidence of a coparticipant. Not only was William Mougey's future at stake but obviously that of his ex-wife and Mr. and Mrs. Burnham. The future security of not only the witness Mougey but three persons very close to him certainly depended on his placing primary responsibility for

the marijuana importing on someone else.

In these circumstances, therefore, it is submitted that the trier of fact should be instructed that evidence independent of such an interested party's testimony must point toward knowing participation by the defendant. If this be true, then defense requested instructions numbers 2 through 9 should have been given, and the failure to so give constituted prejudicial error.

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VI.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the conviction of appellant must be reversed.

Respectfully submitted:

SHEELA, O'LAUGHLIN, HUGHES & CASTRO

By _____
Peter J. Hughes
Attorney for Appellant

CERTIFICATE

I, Peter J. Hughes, certify, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

Peter J. Hughes

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA

SEPTEMBER, 1966-GRAND JURY

UNITED STATES OF AMERICA, Plaintiff, v. DONALD LANNOM, MRS. DONALD LANNOM, Defendants.	No. 37503 -SD I N D I C T M E N T (U.S.C., Title 21, Section 176a Smuggling and concealing marihuana; U.S.C., Title 18, Section 2 - Aiding and abetting)

The Grand Jury charges:

COUNT ONE
(U.S.C., Title 21, Section 176a; U.S.C. Title 18,Sec.2

On or about April 22, 1966, in San Diego County, which was then within the Southern Division of the Southern District of California, as previously ascertained by law, WILLIAM ROY MOUGEY and KATHERINE MOUGEY, with intent to defraud the United States, knowingly smuggled and clandestinely introduced into the United States from Mexico approximately 198 pounds of marihuana, which marihuana should have been invoiced, and knowingly imported and brought into the United States from Mexico said marihuana contrary to law, in that said marihuana had not been presented for inspection, entered and declared as provided by United States Code, Title 19, Sections 1459, 1461, 1484, and 1485; and defendants

DONALD LANNOM and MRS. DONALD LANNOM knowingly aided, abetted, counseled, induced and procured the commission of the aforesaid offense.

COUNT TWO

(U.S.C., Title 21, Sec. 187a)
(U.S.C., Title 18, Section 2)

On or about April 22, 1966, in San Diego County, which was then within the Southern Division of the Southern District of California as previously ascertained by law, WILLIAM ROY MOUGEY and KATHERINE MOUGEY, with intent to defraud the United States, knowingly concealed, and facilitated the transportation and concealment of approximately 198 pounds of marihuana, which marihuana had been imported and brought into the United States contrary to law; and defendants DONALD LANNOM and MRS. DONALD LANNOM knowingly aided, abetted, counseled, induced and procured the commission of the aforesaid offense.

A TRUE BILL

_____
Foreman

_____
EDWIN L. MILLER, Jr.
United States Attorney

APPENDIX B

DEFENDANT'S REQUESTED INSTRUCTION NO. 1

"A witness available to the prosecution to maintain its burden which it does not produce or explain why it cannot, is presumed one who would testify against the Government." (Exact quote.)

Yaw v. United States, 228 F.2d 382 (9th Cir.1958).

REQUESTED BY PETER J. HUGHES
ATTORNEY FOR DEFENDANT

APPENDIX C-1

DEFENDANT'S REQUESTED INSTRUCTION NO. 2

It is the law that the testimony of an accomplice ought to be viewed with distrust.

It is specifically requested that the foregoing instruction be given in lieu and in place of CALJIC 829.

APPENDIX C-2

DEFENDANT'S REQUESTED INSTRUCTION NO. 3

A conviction may not be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense.

(Exact quote of first paragraph CALJIC 821.)

APPENDIX C-3

DEFENDANT'S REQUESTED INSTRUCTION NO. 4

Such corroborating evidence must not only connect him with the crime with which he is charged, but it must do so without aid or direction from the testimony of the accomplice (or accomplices) whose testimony is to be corroborated.

APPENDIX C-4

DEFENDANT'S REQUESTED INSTRUCTION NO. 5

Corroborative evidence is additional evidence to the same point and although it need not be sufficient standing alone to support a conviction, it must relate to some act or fact which is an element of the offense with which the defendant is charged. It must, in and of itself and independent of the

evidence which it supports, fairly and logically tend to connect the defendant with the commission of the alleged offense. Corroborative evidence may consist of other evidence of circumstances, the testimony of a witness other than an accomplice, or the testimony or admissions, if any, of the defendant.

In determining whether an accomplice has been corroborated you must first assume the testimony of the accomplice to be removed from the case. You must then determine whether there is any remaining evidence which tends to connect the defendant with the commission of the offense. If there is none you must acquit the defendant. If there is such evidence then his testimony is corroborated. But before you may convict the defendant you must find from all the evidence that it carries the convincing force required by law.

CALJIC 822 (1962 Revision).

APPENDIX C-5

DEFENDANT'S REQUESTED INSTRUCTION NO. 6

There can be no question that it is insufficient corroboration merely to connect a defendant with the accomplice or other persons participating in the crime, but evidence independent of the testimony of the accomplice must tend to connect a defendant with the crime itself, and not simply with its perpetrators. It is not with the person who commits the offense that the connection must be had but with the commission of the crime itself.

APPENDIX C-6

DEFENDANT'S REQUESTED INSTRUCTION NO. 7

Association with a criminal is not to be equated with connection with the crime so far as the requirement of independent evidence tending to connect defendant with the commission of an offense, as required by the accomplice corroboration rule.

> " ' "It is necessary that the evidence corroborating an accomplice shall connect or tend to connect the defendant with the commission of the crime. Corroborative evidence is insufficient where it merely casts a grave suspicion upon the accused. It must not only show the commission of the offense and the circumstances thereof, but must also implicate the accused in it..." ' "

People v. Robinson, 61 A.C. 413, 439.

APPENDIX C-7

DEFENDANT'S REQUESTED INSTRUCTION NO. 8

An accomplice is one who is liable to prosecution for the identical offense charged against the defendant on trial. To render a person an accomplice,he, in some manner, knowingly and with criminal intent must have aided, advised, encouraged or participated in the commission of the criminal act charged.

APPENDIX C-8

DEFENDANT'S REQUESTED INSTRUCTION NO. 9

Under the definition of an accomplice I instruct you that as a matter of law the witness, William Mougey, is an accomplice, and the rules applicable to an accomplice must be applied to his testimony.

AFFIDAVIT OF SERVICE BY MAIL

STATE OF CALIFORNIA)
COUNTY OF SAN DIEGO) ss

Arlene V. Ledbetter, being first duly sworn, deposes and says:

That she is a citizen of the United States and a resident of San Diego County, California; that her business address is 1101 U. S. Grant Hotel, San Diego, California; that she is over the age of eighteen years, and not a party to the within action.

That on November 4, 1967, she deposited in the United States mail, San Diego, California, in the within action, No. 21973 - DONALD LANNOM v. UNITED STATES OF AMERICA, in an envelope bearing the requisite postage, a (3) copy of

APPELLANT'S OPENING BRIEF

addressed to:

Edwin L. Miller, Jr.
United States Attorney
Southern District of California
332 United States Courthouse
325 West "F" Street
San Diego, California 92101

at which place there is a delivery service by United States mails from said post office.

Arlene V. Ledbetter

SUBSCRIBED and SWORN to before me this 4th day of November, 1967.

PETER J. HUGHES

Notary Public in and for said State and County